TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 598

DRAKE BAKERIES INCORPORATED, PETITIONER,

vs.

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL AFL-CIO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 11, 1961

CERTIORARI GRANTED JANUARY 22, 1962

SUPREME COURT OF THE UNITED STATES

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INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., FEBRUARY 1, 1962

[fol. A]

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 26343

DRAKE BAKERIES INCORPORATED, Plaintiff-Appellant,

against

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL AFL-CIO, and LOUIS GENUTH, Secretary-Treasurer, LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL, AFL-CIO, Defendants-Appellees.

Appendix of Plaintiff-Appellant

[fol. 1]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Statement

On January 4, 1960 plaintiff Drake Bakeries Incorporated, the appellant herein, instituted this action by filing the complaint herein with the Clerk of the Court of the United States District Court for the Southern District of New York, said case being assigned the index number 60 CIV 16.

On February 12, 1960 defendant Local 50, American Bakery & Confectionery Workers International, AFL-CIO, and Louis Genuth, Secretary-Treasurer, Local 50, American Bakery & Confectionery Workers International, AFL-CIO, the appellees herein, served the plaintiff with a notice of motion for an order staying all proceedings in the action on the ground that the dispute referred to in the complaint was covered by the arbitration provisions of a collective bargaining agreement between the parties. Said motion came on to be argued before Chief Judge Sylvester [fol. 2] J. Ryan. On May 4, 1960 Chief Judge Ryan rendered a memorandum endorsed on the notice of motion, granting defendants' (sic) directing that an order be settled staying further proceedings in this action. On May 16, 1960 Chief Judge Ryan signed an order staying this action and all proceedings herein until arbitration has been had in accordance with the terms of the collective bargaining agreement between the parties.

Plaintiff served a notice of appeal on defendants' attorneys on May 27, 1960 and filed said notice of appeal with the Clerk of the District Court on May 31, 1960.

[fol. 3]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DRAKE BAKERIES INCORPORATED, Plaintiff,

against

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL, AFL-CIO, and LOUIS GENUTH, Secretary-Treasurer, LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL, AFL-CIO, Defendants.

COMPLAINT—Filed January 4, 1960

Plaintiff, Drake Bakeries Incorporated, now presents its complaint against defendants, Local 50, American Bakery & Confectionery Workers International, AFL-CIO, and Louis Genuth, Secretary-Treasurer, Local 50, American Bakery & Confectionery Workers International, AFL-CIO, thereof, by its attorneys, Weil, Gotshal & Manges, and respectfully states:

First: This is a suit for violation of a contract between an employer and a labor organization representing employees in an industry affecting commerce within the meaning of Section 301(a) of the Labor Management Relations Act, as amended, (hereinafter referred to as the "Act"). The jurisdiction of this Court is based upon said Section 301 of the Act.

Second: Plaintiff is a corporation being duly organized and existing under and by virtue of the laws of the State of New York.

[fol. 4] Third: At all times hereinafter mentioned plaintiff was engaged in the sale and manufacture of bakery products in and around the State of New York and other places. In the course and conduct of its business, plaintiff caused a substantial amount of material used in such manufacture to be purchased, delivered and transported in

interstate commerce, and a substantial amount of materials manufactured and sold by it to be purchased, delivered and transported in interstate commerce. Plaintiff was engaged in an industry affecting commerce within the meaning of Section 2, Subdivision (7) of the Act.

Fourth: Defendants were and now are engaged in representing and acting for employee members within the City of New York. Defendant, Local 50, was and is a labor organization within the meaning of Section 2, Subdivision (5) of the Act. Defendants are collective bargaining representatives for certain employees of plaintiff employed at plaintiff's Brooklyn plant located at 77 Clinton Avenue, Brooklyn, New York.

Fifth: Defendants as the collective bargaining representatives of the above described employees, on behalf of themselves, the officers, agents and members of defendant, Local 50, entered into an agreement in writing on or about May 1, 1954 and amended thereafter by further writing dated July 27, 1955, and again by further writing dated August 15, 1958 with plaintiff, setting forth the basic agreement covering rates on pay, wages, hours of employment and other conditions of employment to be observed between the defendants, the officers, agents and members of defendant, Local 50, and the plaintiff.

Sixth: Such agreement between the plaintiff and the defendants was executed for the benefit of the defendants and the members of Local 50 and its benefits thereof were accepted by them and each of them.

[fol. 5] Seventh: Such agreement contained, among other things, the following clause:

"Article VII—No Strikes

(a) There shall be no strike, boycott, interruption of work, stoppage, temporary walk-out or lock-out for any reason during the terms of this contract except that if either party shall fail to abide by the decision of the Arbitrator, after receipt of such decision, under Article 6 of this contract, then the other party shall not be bound by this provision."

Eighth: On or about January 2, 1960 and while the aforesaid agreement was in full force and effect the defendants and the agents and members of Local 50 in violation of the provisions of such agreement authorized, instigated and encouraged the members of defendant, Local 50, who are employees of the plaintiff's plant, located at 77 Clinton Avenue, Brooklyn, New York, to engage in a strike, a concerted stoppage, and/or cessation of services by instigating and encouraging said members to refrain from reporting to work on a regularly scheduled production day, namely, January 2, 1960.

Ninth: Said strike hereinbefore referred to in Paragraph "Eighth" hereof did not occur by reason of plaintiff's failure to abide by any decision of any arbitrator.

Tenth: Plaintiff has duly performed all the conditions of such agreement on its part to be performed.

Eleventh: As a result of the breach of the agreement, as aforesaid, by defendants and the action of defendants and the officers, agents and members of defendant, Local 50, plaintiff has been damaged in the sum of $25,000.00.

[fol. 6] Wherefore, plaintiff demands judgment against defendants for the sum of Twenty-five thousand ($25,000.00) Dollars together with the costs and disbursements of this action.

Weil, Gotshal & Manges, Attorneys for Plaintiff, Drake Bakeries Incorporated, By Edward C. Wallace, a member of the firm, Office and P. O. Address, 60 East 42nd Street, Borough of Manhattan, City of New York.

[fol. 7]

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

60 Civ 16

NOTICE OF MOTION

Sirs:

Please take notice, that on the complaint, and on the affidavit of Louis Genuth hereto annexed, the undersigned will move this Honorable Court at a stated term for motions to be held on the 25 day of February, 1960, U. S. Court House, Foley Square, for an order under and by virtue of the provisions of,

(a) Section 301, Labor-Management Relations Act or, in the alternative.

(b) New York Civil Practice Act Sect. 1451 or, in the alternative.

(c) United States Arbitration Act, 9 U.S.C. Sect. 3 for an order staying all proceedings in this action, on the ground that the dispute referred to in the complaint, and [fol. 8] several related disputes, are covered by the arbitration provisions of the collective bargaining agreement between the parties, and for such other relief as to the court may seem appropriate.

Dated: February 12, 1960.

Yours etc.,

O'Dwyer & Bernstien, Attorneys for Defendant, 40 Wall Street, New York 5, New York, by Paul O'Dwyer.

To: Weil, Gotshal & Manges Esqs., Attorneys for Plaintiff, 60 East 42nd Street, New York 19, N. Y.

[fol. 9]

IN THE UNITED STATES DISTRICT COURT

ATTACHMENT TO NOTICE OF MOTION

Excerpts from Collective Bargaining Agreement Between Drake and Local 50 Annexed to the Defendants' Moving Papers Herein

AGREEMENT made and entered into this 1st day of May 1954 by and between DRAKE BAKERIES INCORPORATED party of the first part, hereinafter referred to as the "Company" or the "Employer", and Local No. 50 BAKERY AND CONFECTIONERY WORKERS' INTERNATIONAL UNION OF AMERICA, affiliated with the American Federation of Labor, party of the second part, hereinafter referred to as the "Union".

WITNESSETH

WHEREAS, the Employer is engaged in the baking industry; and

WHEREAS, the Union represents certain employees of the Employer as hereinafter set forth; and

WHEREAS, the parties hereto desire to cooperate in establishing fair working conditions and also desire to provide methods for a fair and peaceful adjustment of all disputes that may arise between the parties hereto, so as to secure uninterrupted operation of working conditions in the business;

NOW, THEREFORE, in consideration of the premises and of the mutual covenants herein contained, the parties hereto hereby agree as follows:

• • •

ARTICLE V—GRIEVANCE PROCEDURE

(a) The parties agree that they will promptly attempt to adjust all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this contract or any act or conduct or relation between the parties hereto, directly or indirectly.

[fol. 10] In the adjustment of such matters the Union shall be represented in the first instance by the duly designated committee and the Shop Chairman and the Employer shall be represented by the Shop Management. It is agreed that in the handling of grievances there shall be no interference with the conduct of the business.

(b) If the Committee and the Shop Management are unable to effect an adjustment, then the issue involved shall be submitted in writing by the party claiming to be aggrieved to the other party. The matter shall then be taken up for adjustment between the Union and the Plant Manager or other representative designated by management for the purpose. If no mutually satisfactory adjustment is reached by this means, or in any event within seven (7) days after the submission of the issue in writing as provided above, then either party shall have the right to refer the matter to arbitration as herein provided.

ARTICLE VI—ARBITRATION

(a) The Arbitrator shall be designated by the New York State Board of Mediation upon the written request of either the Employer or the Union.

(b) The Arbitrator shall consider each case solely on its merits and this contract shall constitute the basis upon which the decision shall be rendered. The Arbitrator shall have no power to alter, amend, revoke or suspend any of the provisions of this contract.

(c) The decision of the Arbitrator shall be binding upon both parties for the duration of this contract.

(d) Should any party fail, upon written notice, to appear before the Arbitrator in any matter submitted for arbitration as herein provided, the Arbitrator may proceed [fol. 11] with the hearing, and render his decision upon the testimony and evidence presented, which decision shall be binding and shall have the same force and effect as if both parties were present.

(e) The Arbitrator's decision shall be based only on evidence presented to him in the presence of both parties or otherwise made available to both parties.

ARTICLE VII—NO STRIKES

(a) There shall be no strike, boycott, interruption of work, stoppage, temporary walk-out or lock-out for any reason during the terms of this contract except that if either party shall fail to abide by the decision of the Arbitrator, after receipt of such decision, under Article 6 of this contract, then the other party shall not be bound by this provision.

(b) The parties agree as part of the consideration of this agreement that neither the International Union, the Local Union, or any of its officers, agents or members, shall be liable for damages for unauthorized stoppage, strikes, intentional slowdowns or suspensions of work if:

(a) The Union gives written notice to the Company within twenty-four (24) hours of such action, copies of which shall be posted immediately by the Union on the bulletin board that it has not authorized the stoppage, strike, slowdown or suspension of work, and

(b) if the Union further cooperates with the Company in getting the employees to return and remain at work.

It is recognized that the Company has the right to take disciplinary action, including discharge, against any employee who engages in any unauthorized strike or work [fol. 12] stoppage, subject to the Union's right to submit to arbitration in accordance with the agreement the question of whether or not the employee did engage in any unauthorized strike or work stoppage.

• • •

ARTICLE XI—WORK WEEK

(A) (1) Forty (40) hours in five (5) days shall constitute the basic work week.

(2) Every permanent employee who reports for work regularly every day during the work week will be guaranteed forty (40) hours of work for the week.

(3) The Union and the Employer will cooperate in all respects on all problems affecting the 5 day work week.

(4) The parties understand that it is the spirit and intent of this agreement for all employees to enjoy a 5 day week. The Union recognizes, however, that occasions may arise when it might become necessary for an employer to require that work be performed on the 6th and/or 7th consecutive day in a normal week; or the 5th, 6th and/or 7th consecutive day in a holiday week. The Union therefore agrees that if, under such circumstances, it cannot supply qualified workers, as requested by the Employer, it and the Shop Committee will cooperate with the Employer by having the regular employees work the extra day or days.

• • •

ARTICLE XIV—HOLIDAYS

(A) (1) New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Columbus Day, Thanksgiving Day and Christmas Day shall be known as [fol. 13] holidays. In a week in which any of the above mentioned holidays occur, the Employer guarantees forty (40) hours' pay for all time worked up to thirty-two (32) hours and thereafter time and one-half. Holiday work shall be paid for at the rate of double time, provided, however, that if workers get a day off either before or after the holiday within the holiday week the regular rates will apply.

(2) A holiday work week shall consist of 32 hours over a spread of 4 days. Double time shall be paid for all hours worked on the 5th, 6th and 7th consecutive days in a holiday week.

(3) An employee who fails to work during the holiday week on account of sickness will be entitled to the holiday allowance if he works either in the week before or the week after the holiday week.

• • •

ARTICLE XXIII—MISCELLANEOUS

* * *

NOTICE ON DAY OFF

(C) When an employee's day is to be changed or he is to be changed from one shift to another the Shop Committee shall be notified one (1) week in advance except in case of emergency.

* * *

COOPERATION ON ABSENTEEISM

(L) The Union agrees to cooperate with the Company to eliminate excessive absenteeism, particularly during a holiday week.

* * *

[fol. 14]

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF JOHN MOLLENHAUER IN OPPOSITION TO MOTION

State of New York,
County of New York, ss.:

John Mollenhauer, being duly sworn, deposes and says:

1. I am Plant Manager of the Brooklyn Plant of Drake Bakeries Incorporated, the plaintiff herein, and am fully familiar with the facts in this action. I am making this affidavit in opposition to the motion of the defendant for a stay pending arbitration.

2. Drake Bakeries Incorporated (hereinafter referred to as "Drake") is one of several companies engaged in the preparation and distribution of cake and other bakery products in New York City. For more than fifteen years Local 50, the defendant herein, has been the collective [fol. 15] bargaining agent for Drake's production employees and has had successive collective bargaining agreements with Drake, the last of which is currently in effect and is annexed to defendant's moving papers.

3. All of the companies in the bakery products industry are highly competitive and each tries to obtain whatever competitive advantage is possible. One of the crucial areas of this competition is the freshness of the product. If, at any time, our cake is not as fresh as a competitor's cake, Drake must of necessity suffer severe damage to its good will. If a consumer buys the stale cake he will thereafter associate our name with stale cake and be inclined as a consequence not to buy our cake the next time he goes shopping. Thus, one day's stale cake may not only damage our business for that day but also damages our reputation and name for freshness and quality, and hurts our sales for an indefinite period.

4. It needs no lengthy explanation to demonstrate the point that if we are unsuccessful in competing with the other companies in our industry, we must consequentially reduce the number of people we employ and eventually even discontinue our business altogether. Accordingly, it is vitally important not only to our officers and stockholders that we meet competition but to our employees as well. One way we must compete is to do everything within our power to insure that every product bearing our name is fresh, thereby maintaining our valuable reputation and name for freshness.

5. One troublesome problem in regard to fresh cake is holiday week-ends. This problem was particularly acute during the Christmas and New Year's holiday season of 1959-60. During that season Christmas and New Year's [fol. 16] Day fell on a Friday. Our employees would have that Friday off as a paid holiday. In addition, if we did not open our plant for production on the Saturday immediately following Christmas and New Year's Day, the cake we would send out for sale on the Monday or Tuesday after the holidays, would be cake actually baked on no later than the previous Thursday. Thus, we would be selling cake four to five days old under our name. Such cake would of necessity be stale.

6. As a result of these factors, we decided to schedule production on the Saturdays immediately following Christmas and New Year's Day in order to allow us to sell much

fresher cake. One of the factors which led to our decision to keep the plant open for production on Saturday was that our competitor, Ward Baking was also keeping their plant open for production on the Saturday after New Year's Day. If we were successfully to compete with Ward we, too, had to be opened on the Saturday after New Year's Day.

7. We also decided that in lieu of the Saturdays in question, the Thursdays before Christmas and New Year's Day would not be scheduled for production. These Thursdays were, of course, Christmas Eve and New Year's Eve, two days which people like to have off so that they may celebrate them with their families and prepare for the holidays. We thought that by not scheduling these two significant days for production we would be more than making up for their having to work the Saturdays after Christmas and New Year's Day.

8. We realized, of course, that some of our employees had made plans to spend the entire week-end away from the city. We were willing to let up to approximately 40% of our employees be absent on the Saturday after Christ- [fol. 17] mas since we did not anticipate any unusual demand for cake on the succeeding Monday or Tuesday and consequently we did not have to produce too much cake. But we did need approximately 60% of our employees so that we could fill the demands we would have.

9. We expected full cooperation from the Union despite the fact that because of different circumstances the company had not previously scheduled Saturday production. Work scheduling is and must be an inherent prerogative of management since only management is able to determine what the demands for its products are and what work schedules are necessary for our company to meet those demands and meet competition.

10. The fact that Drake has the unquestioned discretion to schedule production in any way which in its opinion will aid its business is apparent in the language of the collective bargaining agreement. Thus, Article XI (1) reads as follows:

"Forty (40) hours and five (5) days shall constitute the basic work week."

This clause clearly means that any day could be made a normal work day for any employee by Drake just so long as the employee in question had a five day forty hour work week. There is not here present the official language of Monday through Friday, nor are Saturdays and Sundays explicitly or implicitly excluded. In point of fact, since before the plant was organized more than fifteen years ago, we have regularly had employees working on maintenance on Saturdays and Sundays and have regularly had our production of pound cake on Sundays.

[fol. 18]

11. Management's prerogative is further strengthened by Article XI (4) which reads as follows:

"(4) The parties understand that it is the spirit and intent of this agreement for all employees to enjoy a 5 day week. The Union recognizes, however, that occasions may arise when it might become necessary for an employer to require that work be performed on the 6th and/or 7th consecutive day in a normal week; or the 5th, 6th and/or 7th consecutive day in a holiday week. The Union therefore agrees that if, under such circumstances, it cannot supply qualified workers, as requested by the Employer, it and the Shop Committee will cooperate with the Employer by having the regular employees work the extra day or days."

This clause similarly reflects Drake's right to alter the work week whenever "occasions may arise when it might become necessary". Certainly, if Drake could require an employee to work six or seven days a week, it has the right to reschedule work while maintaining a four day holiday week in accordance with its contractual obligation.

12. Finally, Drake's right to make any change in work schedule which it may find necessary is irrefutably established by Article XXIII (C) which reads as follows:

"NOTICE ON DAY OFF

(C) When an employee's day is to be changed or he is to be changed from one shift to another the Shop Committee shall be notified one (1) week in advance except in case of emergency."

The unmistakable meaning of this clause is that Drake may make any changes in work scheduling it may desire so long as it gives the Union one week's advance notice. Indeed, in cases of emergency it need not even give the [fol. 19] Union advance notice. If this is so, surely the contract must permit a rescheduling when the Union has received ample advance notice as it did in the present situation.

13. Furthermore, the Union itself has recognized that the present contract means that Drake is free to schedule Saturday production. It asked in 1954 for a new contract clause reading as follows:

"1. The work week shall consist of five (5) days, from Monday through Friday. Time and a half to be paid after seven (7) hours in any one day and/or after thirty-five (35) hours per week. The pay for the thirty-five hours shall be equivalent to present pay for forty (40) hours. The guaranteed work week shall be thirty-five hours. No work shall be performed on the sixth or seventh day unless agreed to by management, the Committee and the Union."

This request was, of course, denied during the 1954 contract negotiations. (Attached hereto as "Exhibit A" is a copy of the entire Union "Demands" for 1954.) The fact that Drake's right to schedule Saturday production was contested by the Union during a collective bargaining session and then rejected, definitely establishes that Drake under this contract has the full right to schedule production on Saturday whenever it deems it necessary.

14. Despite the clear language of the collective bargaining agreement, despite the scheduling of work on weekends consistently over many, many years, and despite

management's inherent right to reschedule production, the Union now claims that Drake had no right to open the plant for production on the two holiday week Saturdays simply because they had not done so in the past. While it is true that previously the competitive conditions of our industry (or the particular day of the week that [fol. 20] Christmas and New Year's Day happened to fall on) may have made scheduling of work on the Saturday of a holiday week-end unnecessary, these past circumstances can in no way affect whether or not such scheduling is necessary now. It is for exactly this reason that both common sense and the contract allow Drake full liberty to schedule work to meet the needs of the company.

15. The fact that management's rights to reschedule work cannot be changed by alleged past practice, may be demonstrated by an example. For many years the company may not choose to avail itself of its right to lay off employees. But this, of course, could never mean that the Company could never lay off an employee whenever, in the judgment of the employer, the economic circumstances warranted it.

16. Management's inherent and contractual rights to reschedule production do not mean that management must continually exercise them. Rather as inherent prerogatives they must be always available so that management *can* utilize them whenever the circumstances in its judgment demand their exercise.

17. Once having made our decision, we took steps to notify both the Union and our employees promptly so that they would be inconvenienced as little as possible and in order that they would be able to make their personal plans for the holidays as soon as possible. Mr. Curran, our personnel manager, told the Union Shop Committee of this schedule on December 16th, fully ten days before the first Saturday on which we would be open for production (rather than the one week's notice called for under the contract). On the same day we also personally gave each of our employees a written copy of the holiday week schedules. We sent these schedules by mail to the homes

[fol. 21] of our employees who were absent on the day we notified our other employees. We also had a notice posted on our bulletin board informing all of our employees of the holiday schedules. I am annexing to my affidavit as "Exhibit B" and "Exhibit C" copies of the notice sent to our employees and posted on our bulletin board.

18. On December 18th, five representatives of Drake including myself met with the Union Committee to further explain the competitive necessity for opening our plant for production on the Saturdays during the holiday season.

19. We personally devoted many hours to explain to our employees the reasons why we were compelled to schedule production on the two Saturdays involved. Along with other representatives of the employer, I visited each department of our plant and personally explained to our employees why we had Saturday production scheduled.

20. We thus did everything that we possibly could do in order to minimize what inconvenience there would be for our employees. We took steps to insure that each employee would have an early personal notice of his work schedule. We notified the Union sooner than we were required to do under the contract. We were willing to allow a substantial number of our employees to absent themselves during this work day period. We deliberately did not schedule production for Christmas Eve and New Year's Eve. We personally talked to each department. In short, we took every reasonable step which we could take to aid our employees.

21. On December 22nd we met with the Union Committee at its request. We were informed that we had been misinformed about the Union's position. It stated that [fol. 22] it was not instructing its members not to report for work on Saturday. It further stated that there *would* be sufficient employees in to do the necessary work as Drake had requested, but wished to exact from Drake a commitment that any remaining employees who did not show up for work would not be subject to disciplinary action. We accepted this arrangement provided that enough employees reported to meet the needs of the scheduled production.

22. The day after Christmas, eighty employees out of one hundred ninety-one employees scheduled for production showed up. While this number was far less than we had hoped for, we were able to engage in production thanks, in part, to several standby employees whom we called to report for work on that day.

23. During the next week we were again concerned with whether or not our employees would show up on January 2nd, the Saturday after New Year's Day which had, as I have noted, also been long scheduled as a production day. This day was far more important to Drake than the Saturday before Christmas since the period after New Year's Day is traditionally one of peak demand in our industry while the period between Christmas and New Year's is generally one of slack demand. Accordingly, it was far more imperative that we have our plant open for production after New Year's Day, than we have it open for production on the Saturday before Christmas. Only in that way could we meet the heavy demand for our cake during the post New Year's Day period.

24. I sent a telegram to Mr. Genuth of the Union reiterating our position in regard to work on January 7th. A copy of that telegram is annexed to my affidavit as Exhibit "D". Once again I along with other representa-
[fol. 23] tives of Drake visited each department so that we could tell our employees the importance to them of our meeting competition and how this necessity for meeting competition required that we work on the coming Saturday. We even went so far as to send a telegram to the parent International of the Union advising them of the situation. A copy of that telegram is annexed to my affidavit as Exhibit "E".

25. I cannot too strongly emphasize that despite almost three weeks of prior notice as to the required production on Saturday, January 2nd, the Union took no step to arbitrate any alleged claim that the employer was not acting fully within its contractual rights. Indeed at a meeting on December 28th requested by the Union, Mr. Killoran specifically made it clear that the employees would not report on January 2nd.

26. On January 2nd only twenty-six employees out of one hundred and ninety-one showed up. This number was far less than the minimum number of employees necessary for us to actually engage in production and, therefore, we were forced to close down our plant on this vitally important production day. Accordingly, we lost thousands and thousands worth of dollars of production on that day. This loss of production was doubly aggravated by the loss in good will due to the fact that we had not produced any cake on the Thursday before New Year's. Thus, the bulk of the cake bearing our name in the stores on that following Monday and Tuesday was six to seven days old. The enormous loss we suffered both in money and in good will can only be attributed to the arbitrary and unlawful conduct of the Union in flouting its contractual obligation not to strike when it had more than enough time to arbitrate any alleged grievance it claimed to have.

[fol. 24] 27. Before concluding this affidavit I would like to comment on the Union's statement in its moving papers that Drake had previously attempted to arbitrate a breach of the no-strike clause. Drake's attorneys have informed me that in any event Drake's prior actions in other situations and its choice of remedies are irrelevant to its right to seek relief in Federal Court for this particular illegal strike. But besides this, the Union's conduct during the arbitration referred to demonstrates both the necessity for having this matter decided by a court and the basic inconsistency and irresponsibility of the Union. I will, therefore, detail the Union's contract during this previous arbitration.

28. During the summer of 1959 the Union instigated a concerted refusal among our employees to engage in any overtime work. As indicated by my letter which is quoted in full in the Union's moving papers, Drake attempted to have this breach of the no-strike clause submitted to arbitration under the arbitration clause of the contract. At the arbitration before Miss Mabel Leslie, a board member of the New York State Board of Mediation, the Union took the position that the issue of the violation of the no-strike clause was not arbitrable under the contract and, therefore, the arbitrator lacked any jurisdiction to hear our

case and consequently any jurisdiction to award damages or any other relief. I am annexing to my affidavit as Exhibit F a copy of a Union letter to the State Board of Mediation setting forth its position. Throughout this argument the Union consistently insisted that the only remedy Drake had was in the courts rather than before an arbitration tribunal. The Union even refused to let the arbitrator decide the question of whether or not she had jurisdiction to hear the arbitration. Accordingly, they told the arbitrator that if she went ahead with the arbitration they would be forced to leave.

[fol. 25] 29. As a result of the Union's threat to walk out, the arbitrator decided not to go ahead with the hearing. Drake was forced, therefore, to try and settle the dispute with the Union as best it could through negotiation. Consequently, Drake became convinced that arbitration proceedings were an unsatisfactory way to handle breaches of the no-strike clause. The Union could stalemate the entire proceeding by insisting the dispute was not arbitrable and had to be resolved by the courts. Faced with such an argument by the Union coupled with a Union threat to walk out of any arbitration hearing considering such an issue, an arbitrator would be tempted to do what Miss Leslie did, that is to leave the dispute to the parties to resolve between themselves. The arbitrator would then not have to rule on a legal question for which he might lack the legal background and training necessary to a proper understanding of the issues. But such a course would be completely unsatisfactory to the employer since it would then be without any remedy for the breach of the most important clause in the contract from its standpoint —the no-strike clause. This would, of course, make the entire contract a one-way street. The Union on the one hand could enforce by arbitration innumerable restrictions on the employer, while the employer's primary restriction on the Union, the restriction on its right to strike, would be uncertain. Such a situation dictated our decision to institute a Federal Court action for this particular breach of the no-strike clause.

30. Before leaving the incident of the overtime strike, I would like to point out the basic inconsistency of the Union's position. When the Union breached the no-strike clause, during the overtime strike and we tried to remedy that breach through an arbitration proceeding, the Union [fol. 26] insisted that our remedy was to be found in the courts rather than before an arbitrator. Now they have breached the no-strike clause once again, but this time we are seeking relief in Federal Court. Today it is the Union's position that our only remedy is before an arbitrator and not before a court. It seems to be the Union's position that whatever remedy we pick is the improper one and whichever one we have not picked is the proper one. To allow the Union once again to escape the consequences of its violation of the no-strike clause through such an argument can only encourage it to breach this clause again whenever it may desire.

John Mollenhauer

Sworn to before me this 24th day of March, 1960.

Hazel L. Cohen, Notary Public, State of New York, No. 31-5738985, Qualified in New York County, Commission Expires March 30, 1962.

(Exhibits to affidavit are not printed.)

[fol. 27]

IN THE UNITED STATES DISTRICT COURT

MEMORANDUM ENDORSED ON NOTICE OF MOTION—May 4, 1960

On January 4, 1960, the plaintiff Drake Bakeries, Incorporated, instituted this suit to recover damages for an alleged breach of the "no-strike provision" of a collective bargaining agreement, pursuant to Section 301(a) of the Labor-Management Relations Act, *29 U.S.C.A. 185.*

Prior to interposing an answer to the complaint, defendant moves this Court, under Section 3 of the United States Arbitration Act, *9 U.S.C.A. 3,* for a stay of trial pending an arbitration proceeding in accordance with the terms of the collective bargaining agreement. That the

Court has jurisdiction and power to enforce the arbitration clause of this contract is established now by *Textile Workers* v. *Lincoln Mills of Alabama*, 353 U. S. 448 (1957).

The basic grounds upon which plaintiff opposes this application may briefly be summarized as follows: (1) The arbitration provision of the agreement is at best permissive and not mandatory; (2) The action of the union in striking in the face of the no-strike clause (Art. VII of the agreement) acted as a waiver of its rights under the grievance and arbitration provisions; (3) By failure to proceed to arbitration the defendants expressly waived their arbitration rights.

We find no merit in these contentions.

1. A reading of the provisions governing arbitration (Articles 5 and 6) shows that *all* complaints, disputes or grievances *shall* be submitted to arbitration. We find nothing permissive there and hold that this dispute is to be arbitrated.

2. Plaintiff next contends that, even if arbitration be mandatory, by violating one clause of the agreement defendants waived their rights under another clause (arbitra-
[fol. 28] tion). We can find no logical basis for this argument, since if this premise were sustained, every violation of a collective bargaining agreement would act as a waiver of the violating party's right to arbitration, and this would destroy all arbitration agreements which are looked upon with great favor. *Markel Electric Products* v. *United Electrical, Radio & Machine Workers, et al.*, 202 F. 2nd 435. Aside from the purely logical objection to plaintiff's contention, it appears that the better reasoned decisions allow arbitration after a violation of a no-strike provision. *Signal-Stat Corp.* v. *Local 475, etc.*, 235 F. 2nd 298 *cert. den'd* 354 U. S. 911; *Lewittes & Sons* v. *United Furniture Workers*, 95 Fed. Supp. 851.

3. We come then to plaintiff's final contention that the union's failure to proceed to arbitration constitutes a default on the union's part and thus the union has waived its right under the arbitration provision. Since plaintiff was and is the aggrieved party and since there is no evi-

dence before the Court that plaintiff ever attempted to proceed to arbitration by a written demand as required by Article V, Section 6 of the agreement, defendants' failure to initiate arbitration does not amount to a waiver under the circumstances.

We conclude that the arbitration agreement must be enforced and direct that an order be settled staying further proceedings in this suit.

Settle order on notice.

May 4, 1960.

Sylvester J. Ryan, U. S. D. J.

[fol. 29]

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

ORDER APPEALED FROM

A motion having been duly made by the defendant for an order staying this action on the ground that the plaintiff's alleged grievance, as set forth in the complaint, is subject to the arbitration provisions of a collective bargaining agreement between the parties, and the Court having heard counsel for the parties and having given due deliberation and rendered its decision herein, dated May 4, 1960, it is on motion of O'Dwyer & Bernstien, attorneys for the defendant

Ordered, that this action and all proceedings herein shall be and the same hereby are stayed until arbitration has been had in accordance with the terms of the collective bargaining agreement between the parties.

Sylvester J. Ryan, United States District Judge.

[fol. B]

No. 26,343

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DRAKE BAKERIES INCORPORATED, Plaintiff-Appellant,

against

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL, AFL-CIO, Defendant-Appellee.

Appellee's Appendix

[fol. 30]

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

60 Civ. 16

NOTICE OF MOTION

Sirs:

Please take notice, that on the complaint, and on the affidavit of Louis Genuth hereto annexed, the undersigned will move this Honorable Court at a stated term for motions to be held on the 25th day of February, 1960, U. S. Court House, Foley Square, for an order under and by virtue of the provisions of,

(a) Section 301, Labor-Management Relations Act or, in the alternative.

(b) New York Civil Practice Act Sect. 1451 or, in the alternative.

(c) United States Arbitration Act, 9 U. S. C. Sect. 3

for an order staying all proceedings in this action, on the ground that the dispute referred to in the complaint, and [fol. 31] several related disputes, are covered by the arbitration provisions of the collective bargaining agreement between the parties, and for such other relief as to the court may seem appropriate.

Dated: February 12, 1960.

Yours etc.,

O'Dwyer & Bernstien, Attorneys for Defendant, 40 Wall Street, New York 5, New York, by Paul O'Dwyer.

To:

Weil, Gotshal & Manges, Esqs., Attorneys for Plaintiff, 60 East 42nd Street, New York 19, N. Y.

AFFIDAVIT OF LOUIS GENUTH, READ IN SUPPORT OF MOTION

[Same Title]

State of New York,
County of New York, *ss.*:

Louis Genuth, being duly sworn, says:

I am the Secretary-Treasurer of Local 50, American Bakery & Confectionery Workers, AFL-CIO, Defendant herein. I make this affidavit in support of a motion to stay [fol. 32] the action, pending arbitration of the dispute involved, and several other related disputes, all as provided for by the Collective Bargaining Agreement in effect between the parties.

1. Scope of the Agreement to Arbitrate

The complaint makes reference to a collective bargaining agreement between Drake's and Local 50, but omits to state that said agreement contains provisions for arbitration of

> "All complaints, disputes or grievances arising between them involving.
>
> [a] questions of interpretation or application of any clause or matter covered by this contract,
>
> [b] or any act or conduct or relation between the parties hereto, directly or indirectly" (Arts. V, VI).

I am advised by my counsel, Messrs. O'Dwyer & Bernstien, that this is the broadest type of arbitration clause, and is often construed to require that questions of arbitrability, as well as the merits, be decided by the arbitrator.

2. The "Complaint, Dispute or Grievance" Referred to by Plaintiff's Pleading

The plaintiff alleges that Local 50, "authorized, instigated and encouraged" its members employed by Drake's

to engage in a strike by refraining from "reporting to work on a regularly scheduled production day, namely, January 2, 1960."

I deny that Local 50, directly or indirectly, engaged in a strike on January 2, 1960. A strike is a cessation of work as a means of enforcing compliance with some de- [fol. 33] mand. The men who did not work January 2, refrained from doing so for one reason and only one reason: because they believed in good faith they were not required to do so.

January 2, 1960, was the middle day of a three-day holiday week-end. It had become part of the agreement established by past practice of many years, that the company's employees were not to be required to work on such a day. By telegram of December 22, 1959, John Mollenhauer, plant manager of plaintiff confirmed his previous verbal requests "BECAUSE OF THE NEED TO MEET PRESENT PROBLEMS" and as part of "AN ATTEMPT TO BETTER SERVE THE PUBLIC WITH FRESHER PRODUCTS" and stated the company would "REQUIRE THE NECESSARY PERSONNEL TO WORK A REVISED HOLIDAY SCHEDULE."

I answered this telegram by saying,

> "WE HAVE INFORMED YOU THAT WE DID NOT AGREE WITH, OR ACCEPT YOUR PROPOSAL TO AMEND OR ALTER PAST PRACTICE CONCERNING HOLIDAY WEEKENDS. YOUR PROPOSED SCHEDULE AND YOUR THREATS OF DISCIPLINARY PENALTIES VIOLATES CONTRACT AND PRACTICE * * * IF YOU DO NOT RETRACT POSITION WE SHALL DEMAND ARBITRATION."

Further negotiations and telegrams ensued, as a result of which some of the employees volunteered to work Saturday, December 26, "WITHOUT PREJUDICE TO OUR CLAIM OF PAST PRACTICE AND WITHOUT PREJUDICE TO NEGOTIATION OF A RATE OF PAY FOR WORK DONE IN SUCH CIRCUMSTANCES."

None of our members, however, volunteered to work on January 2, 1960, and as a result, a number of arbitrable controversies arose, which are reviewed in our attorneys' letter of January 14, 1960, annexed hereto and made part hereof.

[fol. 34] Briefly, the issues are

(a) Could the Company unilaterally change a past practice pertaining to work on holiday week ends;

(b) Was this action brought in violation of the arbitration clause;

(c) When employees work on a holiday week end, what rate of pay prevails;

(d) May employees be reprimanded for refraining, in good faith, from reporting to work;

(e) May employees be deprived of holiday pay for refusal to work an additional day;

(f) May work during a holiday week be cancelled in face of a guaranty of forty hours pay.

As is explained in our attorneys' letter annexed hereto, arbitration was frustrated and prevented by the commencement of this action on January 4, 1960, the first business day after January 2.

3. Company's Own Past Construction of the Arbitration Clause as Comprehending Claim of Violation of "No Strike" Clause

I am annexing to this affidavit the text of the current collective bargaining agreement, and all amendments to date. As evidence that the commencement of this action was a violation of the arbitration clauses of the agreement, I need only refer to an instance in the recent past, when this very company claimed (without justification), that our members were engaged in an "Overtime Strike."
[fol. 35] In August 1959, Mr. Mollenhauer wrote the New York State Board of Mediation as follows:

"State Mediation Board of New York State
270 Broadway
New York 7, New York

Re: Drake Bakeries Incorporated

vs.

Local 50, American Bakery and Confectionery Workers International, AFL-CIO

Gentlemen:

Our Contract provides for the arbitration of disputes before an arbitrator appointed by the New York State Mediation Board.

We request the appointment of an arbitrator to be selected by the parties from a panel submitted to the parties in your Board. The arbitrator shall determine the question of breach of contract and damages suffered by this Company as a result of any overtime strike that started at our Brooklyn plant on Sunday, August 16th. We request an award of damages against Local 50, American Bakery and Confectionery Workers International, AFL-CIO for damages already sustained by this Company, together with an additional sum in damages for each and every day that this overtime strike continues.

In addition we will request injunctive relief enjoining continuance of this overtime strike.

We respectfully request that this matter be given priority treatment and that a panel of impartial arbitrators be furnished to the parties immediately so that an arbitrator may be selected without delay.

[fol. 36] A copy of this letter is simultaneously being sent to Mr. Louis Genuth, Secretary-Treasurer of Local 50.

Very truly yours,

DRAKE BAKERIES INCORPORATED
JOHN A. MOLLENHAUER
Assistant Manager"

JAM:pc

As a result of the foregoing, we received the following notice of hearing from the State Mediation Board, which as a matter of long-established administrative practice and routine handles arbitrations arising from claims of violation of various "no strike" clauses:

"Drake Bakeries, Inc.
77 Clinton Avenue
Brooklyn 5, N. Y.

Att: Mr. John A. Mollenhauer, Asst. Mgr.
Local 50, American Bakery & Conf. Wkrs.
799 Broadway
New York 3, N. Y.

Issue: Breach of contract & damages as a result of an overtime strike

Arbitrator: Miss Mabel Leslie

Gentlemen:

We have been asked to name an arbitrator in the dispute stated above. It is our understanding that this request is made pursuant to the terms of an existing collective bargaining agreement. We have accordingly designated a member of our Board who will conduct a hearing at the office of the Board, 270 Broadway, on Monday, September 14, 1959, at 2 P. M.
[fol. 37] Please be present at that time and ready to proceed. Bring the labor contract with you and any records which may be pertinent. Any question concerning this designation or Board procedure should be directed to me.

Very truly yours,

cc: Robert Abelow, Esq.
60 East 42nd St., N. Y. C.
O'Dwyer & Bernstien, Esqs.
40 Wall St., N. Y. 5

Louis Yagoda
District Director"

Our union denied that there was any merit to the claim that an "overtime" strike was taking place; in any event, the matter was ultimately settled.

Now, however, the Company seeks to by-pass the arbitration tribunal which the parties had agreed to resort to, and seeks to litigate one aspect of a dispute that actually manifests itself in a number of separate questions for arbitration.

Incidentally, on behalf of the union I admit paragraphs Second, Third, Fourth, Fifth, Sixth, and Seventh of the complaint except that I would like to point out with respect to "Fifth", that the agreement incorporates, by labor-management usage, certain past practices not expressly set forth; and I would like to add, with respect to paragraph "Seventh" that the written parts of the agreement, including the arbitration clause, are annexed to this affidavit. I deny paragraphs Eighth, Ninth, Tenth, and Eleventh. Paragraph First merely states a legal conclusion. I respectfully pray that the court treat this affidavit as a counterclaim for specific performance of an agreement to arbitrate, and this motion as a motion for summary judgment on such counterclaim, if, in the court's opinion, such is procedurally appropriate.

[fol. 38] Wherefore, since the issues in this action are referable to arbitration under the agreement of the parties, together with the issues specified in the annexed letter of O'Dwyer & Bernstien dated January 14, 1960, the defendant respectfully requests that the trial of this action, and all proceedings therein be stayed, and that arbitration be directed in accordance with the terms of the agreement.

Louis Genuth

(Sworn to February 12, 1960.)

LETTER FROM O'DWYER & BERNSTIEN TO PLAINTIFF'S ATTORNEYS

January 14, 1960

Re: Drake Bakeries, Incorporated and
Local 50 A. B. C.-A. F. L.-C. I. O.

Weil, Gotschal & Manges
60 East 42nd Street
New York 17, N. Y.

Gentlemen:

Some days prior to December 22, 1959, your client Drake Bakeries, Incorporated, proposed to our client Local 50 of the American Bakery & Confectionery Workers, A.F.L.-C.I.O. that Local 50 should amend or alter the long-standing past practice and agreement between the parties concerning holiday weekends. Various reasons were given by your client for this request to make a change, which reasons are not of particular pertinence at this time.

Our client, after negotiation, declined to accept the change that your client had proposed. Your client then claimed that the refusal of Local 50 to agree to the proposed change of contract and practice subjected its members to disciplinary action. Your client was promptly informed that the threat of disciplinary action violated the collective bargaining agreement.

[fol. 39] Without prejudice to the position taken by the parties, and without prejudice to the negotiation of a rate of pay for work done in the circumstances, some of the members of Local 50 volunteered to work on Saturday, December 26th. In accordance with the collective bargaining agreement, the union submitted in writing the grievance pertaining to rate of pay for voluntary work.

In violation of the collective bargaining agreement, your client then instituted an action in the United States District Court for the Southern District of New York. Your client also purported to issue written reprimands to three members of the shop committee of the union. Your client also read a letter dated January 5, 1960, to the members of our client employed in the Brooklyn plant, but refrained from sending the text of the letter to our client.

There have thus arisen the following separate arbitrable controversies, all relating to the same subject matter:

1. Whether the company violated the contract by filing an action in the federal court in violation of the arbitration clause, thereby imposing on the union the expense of defending such action;

2. In view of the contract and past practice of the parties pertaining to holiday weekends, what shall the rate of compensation for employees reporting for duty on December 26, 1959, be;

3. Whether there was just cause for the written reprimands issued by the company to members of the shop committee under date of January 4, 1960;

4. Whether there was just cause for withholding holiday pay as announced by the company's letter of January 5, 1960;

5. Whether the employees of the company who worked, or were ready, willing and able to work, thirty-two hours during the weeks ending, respectively, December 25, 1959, [fol. 40] and January 1, 1960, are entitled, pursuant to the contract, to forty hours pay for such weeks.

In the case of each of such issues the question is also raised: What shall the remedy be?

Local 50 has asked us to take each of these issues to arbitration. We are informing your client through a copy of this letter of the intentions of the local in this matter, and each of these issues is hereby submitted in writing to the extent not heretofore submitted in writing, or discussed on the merits in lieu of submission in writing.

However, in the circumstances it seems appropriate to dispose of the federal court action by motion to dismiss or motion to stay, as the court may determine to be appropriate. Pending final determination in the federal court action of such motion to dismiss or stay, it would not seem proper to prosecute the arbitrations enumerated herein. We are therefore sending a copy of this letter to the New York State Mediation Board, so that it may take note of the existence of the situation, and we hereby notify your

client through you that when the federal court action has been disposed of we shall ask that these arbitrations be placed on the calendar of the Mediation Board.

Respectfully yours,

HNM:ms

cc: Drake Bakeries, Incorporated,
77 Clinton Ave., Brooklyn 5, N. Y.

cc: New York State Mediation Board,
270 Broadway, New York, N. Y.

cc: Local 50, Amer. Bakery & Conf. Workers Intl,
799 Broadway, New York, N. Y.

[fol. 41]

IN THE UNITED STATES DISTRICT COURT

EXCERPTS FROM COLLECTIVE BARGAINING AGREEMENT

Agreement made and entered into this 1st day of May 1954 by and between Drake Bakeries Incorporated party of the first part, hereinafter referred to as the "Company" or the "Employer," and Local No. 50 Bakery and Confectionery Workers' International Union of America, affiliated with the American Federation of Labor, party of the second part, hereinafter referred to as the "Union."

• • •

Foremen

(F) Foremen and foreladies shall not be permitted to work.

Share the Work

(G) The Employer agrees to the principle of sharing the available work among regular employees. The practical application of this principle shall be a matter for discussion and agreement between the Employer and the Union in the event of a reduction in the work available.

• • •

Cooperation on Absenteeism

(L) The union agrees to cooperate with the Company to eliminate excessive absenteeism, particularly during a holiday week.

• • •

(N) The Union agrees to require its members to comply fully with all of the terms of this contract and the Employer agrees for itself and its representatives to comply fully with all of the terms of this contract.

• • •

[fol. 42]

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF HOWARD N. MEYER, READ IN SUPPORT OF MOTION

State, County and City of New York, ss.:

Howard N. Meyer, being duly sworn, says:

I am associated with defendants' attorneys, and have personal knowledge of some of the events referred to in the plaintiff's answering affidavit. I am the attorney referred to in the Union's letter (Exh. F to the Employer's affidavit), who was "away on vacation" when the Union's letter of August 26, 1959 was written.

Mr. Mollenhauer is entirely incorrect in stating, as he does (p. 13)* that the Union claimed that a violation of the "no-strike clause" was not arbitrable. I know. I was there. No such claim was made. I stated for the Union that because of the 1953 deletion of the "compulsory overtime" clause, there was no arbitrable controversy *as to the claimed existence of an obligation to work overtime* when the employer so directed. I never said the "only remedy" the employer had was in the courts. I took the position—the position required under Section 1458 of the New York Civil Practice Act—that the employer should serve a

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* Appellants' Appendix, p. 24a.

"ten-day" notice of intention to arbitrate since the Union claimed that the 1953 deletion of the compulsory overtime clause subtracted that issue from the area of arbitrable controversy under the contract.

The question raised was not whether the arbitrator had "jurisdiction" but whether the employer's position in de- [fol. 43] manding compulsory overtime (after having bargained away, in 1953, a compulsory overtime clause), was so frivolous as to be non-arbitrable under the New York cases dealing with such questions. The Arbitrator did *not* decide not to go ahead with the hearing, but only to adjourn it, so that the employer could either serve a ten-day notice, or move to compel arbitration. The parties settled the dispute and that was the end of it. But the Union never took the position that the employer's remedy for the substantive dispute was in the courts.

Mr. Mollenhauer's lengthy affidavit goes into many matters, and is inaccurate as to some of them. But what is most important is its failure to show by a scintilla of evidence that there was even a strike on January 2d, 1960. He says that 80, out of 191, came in on December 26, and does *not* call this a "strike"—and that 26, out of 191, came in on January 2—and decides this *was* a "strike."

What he forgets, however, is that a strike is a legally identifiable series of events of which a characteristic part is a *demand;* i.e., "a strike is a cessation of work as a means of enforcing compliance with some demand upon the employer" (40 Words & Phrases, 309). Here, however, there was a mere failure to come to work, by employees who did not regard themselves as obligated to come to work. They did come to work on the next business day; they made no demands, directly or indirectly, while they were out.

Most of Mr. Mollenhauer's affidavit is an exposition and explanation as to the need for fresh cake and why he wanted to change his company's holiday weekend practices. Such exposition is of no importance here, where the only question really presented is, was there a collective bargaining agreement with an arbitration clause broad enough to cover an alleged violation of the no-strike clause. There is no issue raised as to the employer's "right to open the plant" (par. 14). The issue is whether regular employees may be

required to work at straight time under pain of disciplinary action when "the company had not previously scheduled Saturday production" (par. 9).

[fol. 44]

This is typically a question for an arbitrator. Since the employer knew, before January 2, that the Union did not agree with its position on the question the employer could have taken it to arbitration long before.

In point of fact the Union, as soon as it got wind of the employer's position, served notice December 22 "YOUR PROPOSED SCHEDULE AND YOUR THREATS OF DISCIPLINARY PENALTIES VIOLATES CONTRACT AND PRACTICE * * * IF YOU DO NOT RETRACT POSITION WE SHALL DEMAND ARBITRATION." Subsequently, the Union submitted in writing, as required by the grievance procedure, and as a prelude to arbitration, its grievance as to the proper rate of pay for the employees who reported December 26. The only reason why this was not taken to arbitration is that the contract required that seven days elapse (Art. V(b)) and by the time such period had expired this action had begun.

The major part of the Employer's brief herein is an attempt to reargue and persuade this Court to overrule the decision of the Court of Appeals in Signal-Stat. The balance—Point II—which attempts to distinguish the contract language in Signal-Stat overlooks the contract language in *Lewittes* (95 F. Supp. 851) is quite similar to that of the present contract.

Incidentally, as to the ultimate merits of the dispute, the Court, in our view, is not primarily concerned. However, it is important to balance the written contract provisions cited by Mr. Mollenhauer against the practice which he admits to, namely, that for fifteen years or more, "the company had not previously scheduled Saturday production" under the circumstances involved in this case. The Company has in the recent past procured an arbitration award to be rendered on the basis of abandonment of a written contract clause by the conduct and practice of the parties. It succeeded in persuading Hon. Burton B.

[fol. 45]

Turkus, a member of the New York State Board of Mediation, so to hold, in an award acknowledged August 24, 1956, where he held *In the Matter of Drake Bakeries Inc.* and *Local 50*:

"Labor relations is a continuing day-to-day process. It is a dynamic process with sometimes slowly, sometimes rapidly, changing relationships. Periodically, perhaps annually, bi-annually, etc., the relationship is formalized by the negotiation and execution of a collective bargaining agreement. After that it reverts to the more informal, dynamic, evolving relationship.

"The agreement between the parties on sharing the work when formalized in the collective bargaining agreement would appear to be without exception. But the proof is that on prior occasions, the company had laid off personnel as the result of technological improvements and the Union has not sought to discuss and agree upon the practical application of the agreed principle of sharing the work in such situations. The Union then, by its continuing course of conduct over the years, has evinced a clear-cut recognition that it does not consider the 'Share the Work' clause operative in cases of lay-offs resulting from technological advances and improvements. The parties by their day-to-day relations have in effect limited, amended and finalized a portion of their formal collective bargaining agreement."

This action never should have been begun, and should now be dismissed or stayed.

Howard N. Meyer

(Sworn to April 5, 1960.)

[fol. 46]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

SUPPLEMENTAL AFFIDAVIT OF LOUIS GENUTH, READ IN SUPPORT OF MOTION

State, City and County of New York, ss.:

Louis Genuth, being duly sworn, deposes and says:

I wish to supplement my moving affidavit by exhibiting to the Court a notice, posted February 22nd, 1960, by the plaintiff.

This notice, which speaks for itself, demonstrates that the company has reverted to its past practice and respected the three day weekend which occurred on Washington's birthday.

This reinforces our claim—which we expect to prove to the satisfaction of the arbitrator agreed upon by the parties—that there was no "strike" on January 2nd, but, rather a refraining in good faith from reporting to work in the belief, honestly held, that there was no contractual obligation to report.

Louis Genuth

(Sworn to April 5, 1960.)

[fol. 47] To: ALL EMPLOYEES From: J. P. CURRAN

Subject: WASHINGTON'S BIRTHDAY HOLIDAY SCHEDULE Date: 2-12-60

We reviewed our work schedule for the coming Holiday week (Washington's Birthday) and the schedule will be Tuesday thru Friday, generally.

The night shifts will be off Sunday P. M. and will work on Monday P. M., February 22nd.

[fol. 48]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 99—October Term, 1960.

(Argued December 13, 1960)

Docket No. 26343

DRAKE BAKERIES, INCORPORATED, Plaintiff-Appellant,

—v.—

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL, AFL-CIO, Defendant-Appellee.

Before:

LUMBARD, *Chief Judge* and
SWAN and MOORE, *Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York by which Chief Judge Ryan stayed plaintiff's action brought pursuant to section 301(a) of the Labor-Management Relations Act, 29 U. S. C. A. §185(a) for alleged breach of the "no-strikes" provision of a collective bargaining agreement between the parties, until arbitration has been had in accordance with the terms of said agreement. Reversed.

Robert Abelow, of Weil, Gotshal & Manges, New York City, *for plaintiff-appellant.*

[fol. 49] Howard N. Meyer, of O'Dwyer & Bernstien, New York City, *for defendant-appellee.*

OPINION—February 17, 1961

SWAN, *Circuit Judge*:

This is an appeal by plaintiff, referred to herein as Drake, from an order entered in an action filed in the court below on January 4, 1960. The action was brought pursuant to §301(a) of the Labor-Management Relations Act, 29 U. S. C. A. §185(a), to recover damages for breach of a "no-strikes" provision in a collective bargaining agreement between plaintiff and defendant, Local 50, referred to herein as the Union.[1] Before answering the complaint the Union moved under section 3 of the Arbitration Act, 9 U. S. C. A. §3, to stay all proceedings in the action until arbitration was had in accordance with the terms of an arbitration provision in the collective bargaining agreement. From the order granting this motion Drake has appealed.

The affidavits in support of, and in opposition to, the motion raise no dispute as to the facts which brought about the alleged strike that caused Drake to bring its action. Drake is engaged in the production and sale of cake. [fol. 50] During the winter of 1959-1960, Christmas and New Year's Day fell on Friday. If Drake's cake was baked on the Thursday before Christmas or New Year's and sold on the Monday following these holidays it would not be fresh. This would impair Drake's competitive position with

[1] Section 185(a) provides:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Subsection (b) deals with the responsibility of labor organizations and employers for the acts of their agents, declares a labor organization an entity for purposes of suit, and provides for the enforcement of money judgments against labor organizations. Subsection (c) although framed in terms of 'jurisdiction,' deals with venus. Subsection (d) deals with service of process on labor organizations. Subsection (e) deals with determination of the question of agency."

concerns which did produce cake on the Saturdays following the holidays and would injure Drake's business reputation. On December 16, 1959, Drake gave notice to its employees and to the Shop Committee of the Union that its production employees need not work on the Thursday immediately preceding the holidays but would be expected to do so on the Saturday following them. Enough employees reported for work on the Saturday following Christmas to enable bakery products to be produced, but on the Saturday following New Year's Day only 26 out of 191 employees showed up. These were too few to engage in production and Drake was forced to close its plant on that important scheduled production date. Two days later, the present suit was filed, charging that the defendants had "instigated and encouraged" the members of the Union "to engage in a strike, a concerted stoppage, and/or cessation of services." Whether the Union breached the "no-strikes" clause and whether the rescheduling was permissible for the particular week involved we need not decide, since the only question before us is whether the District Court or an Arbitrator should determine whether the Union violated the "no-strikes" provision of the collective bargaining agreement.

The collective bargaining agreement contains provisions entitled "Grievance Procedure" (Article V), and "Arbitration" (Article VI) and "No-Strikes" (Article VII); they are set out in the margin.[2] Each article must be interpreted

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[2] "ARTICLE V—GRIEVANCE PROCEDURE

(a) The parties agree that they will promptly attempt to adjust all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this contract or any act or conduct or relation between the parties hereto, directly or indirectly.

In the adjustment of such matters the Union shall be represented in the first instance by the duly designated committee and the Shop Chairman and the Employer shall be represented by the Shop Management. It is agreed that in the handling of grievances there shall be no interference with the conduct of the business.

(b) If the Committee and the Shop Management are unable to effect an adjustment, then the issue involved shall be sub-

[fol. 51] with relation to the others. Article V requires an "attempt to adjust all complaints, disputes or grievances * * * involving questions of interpretation or application of [fol. 52] any * * * matter covered by this contract or any conduct or relation between the parties hereto, directly

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mitted in writing by the party claiming to be aggrieved to the other party. The matter shall then be taken up for adjustment between the Union and the Plant Manager or other representative designated by management for the purpose. If no mutually satisfactory adjustment is reached by this means, or in any event within seven (7) days after the submission of the issue in writing as provided above, then either party shall have the right to refer the matter to arbitration as herein provided.

ARTICLE VI—ARBITRATION

(a) The Arbitrator shall be designated by the New York State Board of Mediation upon the written request of either the Employer or the Union.

(b) The Arbitrator shall consider each case solely on its merits and this contract shall constitute the basis upon which the decision shall be rendered. The Arbitrator shall have no power to alter, amend, revoke or suspend any of the provisions of this contract.

(c) The decision of the Arbitrator shall be binding upon both parties for the duration of the contract.

(d) Should any party fail, upon written notice, to appear before the Arbitrator in any matter submitted for arbitration as herein provided, the Arbitrator may proceed with the hearing, and render his decision upon the testimony and evidence presented, which decision shall be binding and shall have the same force and effect as if both parties were present.

(e) The Arbitrator's decision shall be based only on evidence presented to him in the presence of both parties or otherwise made available to both parties.

ARTICLE VII—NO-STRIKES

(a) There shall be no strike, boycott, interruption of work, stoppage, temporary walk-out or lock-out for any reason during the terms of this contract except that if either party shall fail to abide by the decision of the Arbitrator, after receipt of such decision, under Article 6 of this contract, then the other party shall not be bound by this provision.

(b) The parties agree as part of the consideration of this agreement that neither the International Union, the Local Union, or any of its officers, agents or members, shall be liable

or indirectly." This is broad language. But the second paragraph contains a very significant limitation: *"It is agreed that in the handling of grievances there shall be no interference with the conduct of the business."* [Italics added.] If grievances are not "adjusted" in accordance with Article V, "then either party shall have the right to refer the matter to arbitration as provided in Article VI." Article VII states very specifically that "There shall be no strike, boycott, interruption of work, stoppage, temporary walkout or lock-out for any reason," with one exception, namely, *"if either party shall fail to abide by the decision of the Arbitrator, after the receipt of such decision, under Article 6 of this contract, then the other party shall not be bound by this provision."* [Italics added.] In the case at bar no arbitrator has rendered a decision.

[fol. 53] Reading the three articles together, we think it clear that the arbitration provided for concerns only questions brought up through the Grievance Procedure; that Article VI sets forth the mechanics, not the scope, of the arbitration, the scope being set forth in Article V; and that a breach of Article VII is not within the scope of Article V. Moreover, the Union, although it made some objection to the employer's rescheduling of work on the Saturdays following the holidays, did not request the designation of an arbitrator, as provided in clause (a) of Article VI, but

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for damages for unauthorized stoppage, strikes, intentional slowdowns or suspensions of work if:

(a) The Union gives written notice to the Company within twenty-four (24) hours of such action, copies of which shall be posted immediately by the Union on the bulletin board that it has not authorized the stoppage, strike, slowdown or suspension of work, and

(b) if the Union further cooperates with the Company in getting the employees to return and remain at work.

It is recognized that the Company has the right to take disciplinary action, including discharge, against any employee who engages in any unauthorized strike or work stoppage, subject to the Union's right to submit to arbitration in accordance with the agreement the question of whether or not the employee did engage in any unauthorized strike or work stoppage."

resorted to the self-help of a strike in direct violation of the "no-strikes" provision of Article VII. Under these circumstances we hold that whether Article VII has been breached by an interruption of work or a temporary walk-out should be decided by the court having jurisdiction of the action brought under 29 U. S. C. A. §185(a), and that the order staying the action was erroneous.

In *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, a union had entered into a collective bargaining agreement with an employer which provided that there would be no strikes or work stoppages and that grievances would be handled pursuant to a specified procedure, the last step of which was arbitration. The employer having refused to arbitrate a grievance dispute, the union sued under §185 to compel arbitration. The Supreme Court, relying upon the legislative history of the statute, held that the District Court properly decreed specific performance of the agreement to arbitrate the grievance dispute. Mr. Justice Douglas' opinion states at page 455:

> "• • • plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, the legislation [§185] does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy [fol. 54] that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way."

Even in the absence of a specific no-strike clause, it has been held that resorting to a strike instead of utilizing the contractual arbitration machinery prevents a union from claiming that the strike must be arbitrated.[3] Where the no-strike clause is as specific as in the case at bar, it seems clear that the parties intended the grievance-arbitration procedure to supplant strikes as a means of resolving

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[3] *W. L. Mead, Inc.* v. *International Brotherhood of Teamsters*, D. C. D. Mass., 129 F. Supp. 313, 315, aff'd, 1st Cir., 230 F. 2d 576; *Gay's Express Inc.* v. *International Brotherhood of Teamsters, Local No. 404*, D. C. D. Mass., 169 F. Supp. 834.

industrial disputes, but did not intend to subject alleged breaches of the no-strike clause to arbitration when a strike was resorted to before making any attempt to utilize the grievance-arbitration procedure.

Support for this conclusion is to be found in *Markel Electric Products, Inc.* v. *United Electrical Workers,* 2 Cir., 202 F. 2d 435, 437, which held that the alleged breach of the no-strike provision was not "within the scope" of an arbitration clause which we read as at least as broad as the one now before us. Our conclusion also accords with decisions in a number of other circuits.[4]

[fol. 55] The Union's brief relies almost exclusively on this court's decision in *Signal-Stat Corp.* v. *Local 475, United Elec. Workers,* 235 F. 2d 298, cert. denied, 354 U. S. 911. It should be noted, however, that *Signal-Stat* does not purport to overrule this court's earlier decision in *Markel,* but merely distinguished that case on the ground that the arbitration provision in *Signal-Stat* was broader. We think *Signal-Stat* distinguishable from the case at bar. There a dispute arose between the plaintiff employer and the defendant union concerning the discharge of two employees. The plaintiff's employees went on strike until it was eventually agreed that all employees, except the two discharged by the company, would return to work and the dispute over the discharged employees would be settled by arbitration. The plaintiff then brought its action for damages, charging a violation of the no-strike clause. That clause did not have the significant exception contained in

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[4] *International Brotherhood of Teamsters, Local 25* v. *W. L. Mead, Inc.,* 1 Cir., 230 F. 2d 576; *Lodge No. 12, Dist. No. 37, IAM* v. *Cameron Iron Works, Inc.,* 5 Cir., 257 F. 2d 467, 471, cert. denied, 358 U. S. 880; *International Union, UAW* v. *Benton Harbor Malleable Industries,* 6 Cir., 242 F. 2d 536; *Hoover Motor Express Co.* v. *Teamsters Local No. 327,* 6 Cir., 217 F. 2d 49; *Cuneo Press, Inc.* v. *Kokomo Paper Handlers' Union No. 34,* 7 Cir., 235 F. 2d 108. Also in accord are two decisions of the Fourth Circuit which were disapproved by this court in *Signal-Stat Corp.* v. *Local 475, United Elec. Workers,* 2 Cir., 235 F. 2d 298, cert. denied, 354 U. S. 911, discussed *infra.* See *United Elec. Workers* v. *Miller Metal Prods., Inc.,* 4 Cir., 215 F. 2d 221; *International Union United Furniture Workers* v. *Colonial Hardwood Flooring Co.,* 4 Cir., 168 F. 2d 33.

Drake's to the effect that a strike was permissible only if the other party had failed to abide by the decision of the Arbitrator after receipt of such decision. Moreover there, unlike the case at bar, the parties had already agreed to end the strike and to arbitrate the dispute which was the cause of the strike before the plaintiff brought suit. While *Signal-Stat* has frequently been cited and followed for other rules there enunciated,[5] our research reveals only two District Court cases in which it was relied upon to hold that an alleged breach of a no-strike clause is an arbitrable issue,[6] and only one other in which that part of the *Signal-*
[fol. 56] *Stat* opinion was cited with approval,[7] although several courts, in post *Signal-Stat* cases, have followed *Markel*.[8]

For the foregoing reasons we think it was error to stay the action. The order is reversed.

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[5] E.g., Judge Learned Hand's opinion in *Council of Western Elec. Tech. Employees—Nat'l* v. *Western Elec. Co.*, 2 Cir., 238 F. 2d 892, 895.

[6] *Tenney Engineering, Inc.* v. *United Elec. Workers, Local No. 437*, D. C. D. N. J., 174 F. Supp. 878; *Armstrong-Norwalk Rubber Corp.* v. *Local No. 283, United Rubber Workers*, D. C. D. Conn., 167 F. Supp. 817.

[7] *Butte Miners' Union No. 1* v. *Anaconda Co.*, D. C. D. Mont., 159 F. Supp. 431.

[8] *Lodge No. 12, Dist. No. 37, IAM* v. *Cameron Iron Works, Inc.*, 5 Cir., *supra* note 4; *International Union, UAW* v. *Benton Harbor Malleable Industries*, 6 Cir., *supra* note 4; *Gay's Express, Inc.* v. *International Brotherhood of Teamsters, Local No. 404*, D. C. D. Mass., 169 F. Supp. 834; *Structural Steel & Ornamental Iron Ass'n* v. *Shopmens Local Union No. 545*, D. C. D. N. J., 172 F. Supp. 354. The conflict between *Structural Steel, supra*, and *Tenney Engineering, supra* note 6, has not yet been resolved by the Third Circuit.

[fol. 57]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DRAKE BAKERIES, INCORPORATED, Plaintiff-Appellant,

—v.—

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL AFL-CIO, and LOUIS GENUTH, Secretary-Treasurer, Local 50, American Bakery and Confectionery Workers International, AFL-CIO, Defendants-Appellees.

JUDGMENT—February 17, 1961

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed in accordance with the opinion of this court; with costs to the appellant.

A. Daniel Fusaro, Clerk.

[fol. 58]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[Title omitted]

MOTION OF INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, AFL-CIO, FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE ON PETITION FOR REHEARING

Please take notice that, upon the annexed affidavit of Benjamin Rubenstein, duly sworn to the 2nd day of March

1961, the undersigned will move, at a motion part of this Court to be held at the United States Courthouse, Foley Square, New York, New York on the 6th day of March 1961 at 10:30 in the forenoon of that day or as soon thereafter as counsel may be heard for an order granting leave to International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, UAW, AFL-CIO, by its attorneys Rubenstein & Rubenstein to file a brief in this case as amicus curiae.

Dated: New York, New York, March 2, 1961.

Rubenstein & Rubenstein, Attorneys for International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, UAW, AFL-CIO.

To:

Messrs. Weil, Gotshal & Manges, Attorneys for Plaintiff-Appellant, 60 East 42nd Street, New York, New York.

Messrs. O'Dwyer & Bernstien, Attorneys for Defendant-Appellee, 40 Wall Street, New York, New York.

[fol. 59]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[Title omitted]

AFFIDAVIT IN SUPPORT OF MOTION

State of New York,
County of New York, ss.:

Benjamin Rubenstein, being duly sworn, deposes and says:

1. I am a member of the firm of Rubenstein & Rubenstein, attorneys for International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, UAW, AFL-CIO, the present applicant for leave to file a brief in this case as amicus curiae. When I learned of the decision rendered herein I communicated with Howard

N. Meyer, Esq. of the firm of O'Dwyer & Bernstein to discuss it with him. When he informed me of his intention to petition for rehearing or for review en banc I requested that he send me a copy of his petition. I received today a galley proof thereof.

2. The applicant has an interest in this case inasmuch as the applicant is a labor organization amenable to suit under §301 of the Labor Management Relations Act and is presently defending several such suits, one of which is now pending in a District Court within this Circuit, the District Court of the District of Connecticut. In the Connecticut case the applicant may seek arbitration of the plaintiff's claim for damages for violation of collective bar- [fol. 60] gaining agreement, and the decision of the Connecticut District Court is likely to be governed by the ruling of this Court in the present matter.

3. Apart from the pending action in Connecticut, the applicant has an interest in this case because of the general effect it will have upon the law of labor relations throughout the country. It is respectfully submitted that the decision heretofore rendered by Judge Swan of this Court, unless set aside upon the pending application for rehearing or for review en banc, would have an adverse effect upon the conduct of labor relations throughout the jurisdiction of this Court and probably throughout the United States. It is further respectfully submitted that Judge Swan's opinion failed adequately to construe the language of the collective bargaining agreement before the Court in this case and misconstrued the tenor thereof in interpreting it in the light of the decisions of this Court in *Markel Electric Products Inc.* v. *United Electrical Workers*, 202 F. 2d 435 and *Signal-Stat Corp.* v. *Local 475*, 235 F. 2d 298, cert. denied 354 U. S. 911.

4. The petition of the Defendant-Appellee for rehearing or for review en banc argues that the decision in the *Signal-Stat* and *Markel* cases are "inconsistent" and that the decision by Judge Swan is inconsistent with *Signal-Stat*, which the Defendant-Appellee asserts to enunciate a rule of law preferable to that of the *Markel* case. It is the position of

the applicant that the discussion in this regard is inadequate in that arbitrability under collective bargaining agreements is in a sense a matter of interpretation of con-
[fol. 61] tractual language rather than wholly a question to be determined by the declaration of a broad policy in favor of or against the arbitration of certain types of disputes, and applicant has no reason to believe that argument on this point will be expanded and made complete by either of the parties to the appeal. If this argument is approved by this Court, it is likely that the prior decision, enunciated in Judge Swan's opinion, will be set aside and the lower court affirmed.

Benjamin Rubenstein

Sworn to before me this 2nd day of March 1961.

(Notary's signature illegible.)

[fol. 62]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[Title omitted]

PETITION FOR REHEARING OR FOR REVIEW EN BANC—
Filed March 3, 1961

Comes now the defendant-appellee Local 50, American Bakery & Confectionery Workers Union, AFL-CIO, and respectfully petitions for rehearing, or review *en banc* of the Court's decision of February 17, 1961, on the following grounds.

A.

The effect of the Court's decision herein will be to invite, in the District Courts in the Second Circuit, a flood of litigation, arising whenever an employer conceives that he has cause to claim conduct by a union member or members was in violation of a "no-strike" provision. We respectfully submit that such a result should be avoided, unless plainly compelled by the language of the statute and contract involved.

[fol. 63] B.

The Court unfortunately overlooked the last sentence of Article VII (quoted at end of footnote on p. 863 of slip opinion). This sentence provides that "disciplinary action * * * against any employee who engages in any unauthorized strike" is *"subject to the Union's right to submit to arbitration"*. Plainly it would require unequivocal language to impute to the parties the intention to submit some aspects of strikes during the contract term to arbitration, and other aspects of the very same strikes to civil actions!

The contract clearly evinces, in this last sentence of Article VII, an intention that "no-strike" disputes shall be arbitrated and we respectfully urge the Court to reconsider the matter and give effect to this expressed intention.[1]

C.

Neither the statute, nor the contract, make any provision for avoidance of the arbitration procedure, merely because it is Article VII, rather than some other Article of the agreement, that is in contention.

The arbitration clause "the scope" of which, as the Court correctly points out, includes "all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this contract *or any act or conduct or relation between the parties hereto, directly or indirectly*" (italics added) has been severely curtailed by the Court's opinion. The meaning, intention, and effect of a subclause relied on by the Court ("It is agreed that in the handling of grievances there shall be no interference with the conduct of [fol. 64] the business") is, *under the very wording of the arbitration clause* for the arbitrators to decide, as a question "of interpretation or application".

The Court's reference to the quoted subclause was unexpected and reveals an entirely mistaken impression. The

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[1] This last sentence of Art. VII is so clear that it might dispense with the necessity of reviewing the basic principle discussed below, subdivision "F" of this petition, pages 4-5 (now side folios 65-66).

fact is, as can be seen from its position in the subparagraph dealing with first step (in-shop) processing of grievances, that it was intended to refer to the situation where the meeting of the "duly designated committee and the Shop Chairman and the Employer" takes place *on the premises of the factory* as referred to in the first sentence of the second paragraph of Article V(a). It is clear from the context that the sole meaning of the words "no interference with the conduct of the business" is to avoid the calling of men from their machines while shop grievances are being discussed. Those words have no relationship whatsoever to the "scope" of arbitration, and were never intended to have any such effect.

Likewise, the Court's reference to, and reliance on, the proviso permitting a strike or lock-out when the other party has disobeyed an award is based on a misunderstanding. That proviso is intended *only* to provide an additional sanction for the *enforcement* of such awards. The proviso has no relationship with or reference to the scope of the arbitration clause. And in any event, its "interpretation or application," the parties expressly agreed, was for the arbitrators.

D.

The Court inadvertently states "the Union * * * did not request the designation of an Arbitrator" (slip opinion, p. 864). The fact is, and the record shows, that the Union could not, under the contract (Art. V, last sentence), request the designation of an arbitrator until the preliminary steps were exhausted, and the record is clear [fol. 65] that the preliminaries were being actively pressed when this action was brought. Following a wire by the Union ("IF YOU DO NOT RETRACT POSITION WE SHALL DEMAND ARBITRATION") there followed the submission, "in writing, and as a prelude to arbitration, its grievance as to the proper rate of pay for the employees who reported December 26" (Def. App. 15b).

The commencement of this action on January 4 was an attempt to frustrate arbitration under the contract before the necessary time period provided by the contract as a prerequisite had elapsed.

E.

The Court, on the record made by affidavits only, seems to pre-judge the merits of the controversy by saying the Union "resorted to the self-help of a strike in direct violation of the 'no-strikes' provision of Article VII" (slip opinion, p. 864). Whether Article VII was violated, either by the Union, or even by a group of employees without Union responsibility, is a matter that should remain for the tribunal which is to try the case, which should be the arbitral tribunal on which the parties agreed.

F.

While not in terms doing so, the effect of the Court's decision is to overrule *Signal Stat* v. *Local 475*, 235 F. 2d 298 (decided by a different panel), in which certiorari was denied, and on which a whole pattern of contract and collective bargaining relationships have been based over a period of years, throughout this entire Circuit.

We respectfully urge that the Court should not impose on the overworked District Judges the burden of fine-combing each of the hundreds of collective bargaining agreements that will come before them, as if they were trust [fol. 66] indentures or bills of lading. Every case taken to Court will involve a search for clues to see if the contract is closer to the one in *Signal Stat*, or to the one in this *Drake Bakeries* case. It will be an unrealistic search. There is no economic factor which is present in some contracts and absent in others which would make it logical that the Courts should strain to distinguish one contract from another in an effort to classify or analyze them on this point.

The real issue is a basic one of principle, namely, whether parties who have agreed to submit *all* disputes to arbitration should wake up and find that one segment of their area of dispute is nevertheless to be taken to Court contrary to their expectations. On this basic question of principle, candor compels us to say that *Signal Stat* is as inconsistent with *Markel* (202 F. 2d 435) as this Court's decision herein is inconsistent with *Signal Stat*. In *Markel*, however, the

Court quoted with approval from *International Union* v. *Colonial Hardwood Co.*, 168 F. 2d at page 35:

> "It would have been possible, of course, for the parties to provide for the arbitration of *any dispute which might arise between them;* but they did not do this * * *." (Emphasis supplied.)

We press upon the Court the proposition that in *this* case the parties *did* agree in Article V(a) to the arbitration of "any dispute which might arise between them" and that no clearer language could have been devised than the language quoted in footnote 2, page 861 of slip opinion herein!

The Court, *en banc,* should decide whether *Signal Stat* is to be, in effect, overruled.

Respectfully submitted,

O'Dwyer & Bernstien, Attorneys for Defendants-Appellees.

[fol. 67]

CERTIFICATE OF COUNSEL

I hereby certify that the above petition for rehearing is presented in good faith and not for purposes of delay.

Howard N. Meyer.

Dated, New York, New York, March 2, 1961.

[fol. 68]

UNITED STATES COURT OF APPEALS

2ND CIRCUIT

[Title omitted]

NOTICE OF MOTION OF NEW YORK STATE AFL-CIO FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF REHEARING

Sirs:

Please Take Notice that on the annexed petition of Herman A. Gray, verified the 10th day of March, 1961 and on

the record, briefs and other proceedings had herein, the undersigned will move this Court at a Term for motion to be held on the 16th day of March, 1961 for leave to be given to the New York State AFL-CIO to join in the petition for rehearing being filed by plaintiff-appellant and, in the event review en banc be granted for permission to file a brief in support of such review as *amicus curiae*.

Yours, etc.,

Herman A. Gray, 551 Fifth Avenue, New York 17, N. Y., Counsel to the New York State AFL-CIO.

To:

O'Dwyer & Bernstien, 40 Wall Street, New York 5, New York, Attorneys for Defendant-Appellee.

Weil, Gotshal & Manges, 60 East 42nd Street, New York, N. Y., Attorneys for Plaintiff-Appellant.

[fol. 69]

No. 26,343

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[Title omitted]

PETITION OF HERMAN A. GRAY ON BEHALF OF THE NEW YORK STATE AFL-CIO TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Your petitioner, Herman A. Gray, respectfully shows:

1. Your petitioner, an attorney-at-law duly admitted to practice before the courts of the State of New York and before this court, makes this application on behalf of the New York State AFL-CIO for leave to file a brief in this action as *amicus curiae* in support of the Defendant-Appellee's application for a stay of this action and for arbitration.

2. The New York State AFL-CIO is an unincorporated association of labor unions operating in New York State. There are over two thousand such unions affiliated with the New York State AFL-CIO with a total membership in excess of two and one-half million workers.

3. While the State AFL-CIO does itself not engage in collective bargaining, one of its principal objectives is to promote collective bargaining and to safeguard the collective labor agreement as the means best suited for the [fol. 70] successful ordering of labor relations in a free economy and a democratic society.

4. The officers of the State AFL-CIO are profoundly disturbed by the decision rendered in this action which holds that the dispute between the parties is not subject to arbitration. It is generally accepted that both from the point of view of employers and the unions arbitration is the simplest, most direct and most effective way of disposing of disputes that arise between them. Court procedures were not developed with a view to dealing with labor relations and litigation not only entails needless delays and expense but usually engenders bitterness which makes it difficult, sometimes impossible, for the parties successfully to live and work together thereafter.

5. The President of the State AFL-CIO spoke to Judge Edward C. Maguire and to your petitioner about this situation. At one time Judge Maguire served as the head of New York City's Department of Labor, a Department devoted exclusively to the task of conciliating labor disputes, and he has for many years dealt with labor relations. Your petitioner teaches the law of labor relations at New York University and has likewise for many years been active in this field, primarily as arbitrator under collective labor agreements.

6. Both Judge Maguire and your petitioner advised the President that the decision here under question runs counter to the steady progress which has been made in the courts in giving increasingly fuller scope to the arbitration provisions contained in collective agreements, that if it

stands it will produce fresh uncertainties and is certain to have a damaging effect on the administration of collective agreements. At the President's request, Judge Maguire and your petitioner have agreed to prepare and submit to [fol. 71] this Court a brief *amicus curiae* on behalf of the New York State AFL-CIO if permission to do so were obtained.

Wherefore, your petitioner respectfully prays this Court that the New York State AFL-CIO be permitted to file a brief as *amicus curiae.*

Dated, New York, March 10, 1961.

Herman A. Gray, Petitioner.

State of New York,
County of New York, ss.:

Herman A. Gray, the petitioner named in the foregoing petition, being duly sworn, deposes and says that he has read the foregoing petition subscribed by him and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Sworn to this 10th day of March, 1961.

Jean Grant, Notary Public, State of New York, No. 41-6626900, Queens County.

[fol. 72]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[Title omitted]

ORDER GRANTING PETITION FOR REHEARING IN BANC—
March 28, 1961

O'Dwyer & Bernstien, New York, N. Y., for defendants-appellees.

Petition for rehearing is denied.

J. E. L., T. W. S., L. P. M., U.S. C. JJ.

All of the active judges concurring, the petition for rehearing in banc is granted. The case will be considered on the briefs unless otherwise ordered.

The motion of International Union, United Automobile Aircraft & Agricultural Implement Workers of America, UAW, AFL-CIO to file a brief as amicus curiae is granted and said brief, not to exceed 25 pages, is ordered to be filed within 15 days from the date of this order.

The motion of New York State AFL-CIO for leave to file a brief as amicus curiae is granted, and said brief, not to exceed 25 pages, is ordered to be filed within 15 days from the date of this order.

Plaintiff-appellant, Drake Bakeries Incorporated, is granted leave to file a reply brief within 15 days of the filing of the amici curiae briefs.

J. E. L., Chief Judge.

March 28, 1961.

[fol. 73]

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Charles E. Clark, Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Hon. Henry J. Friendly, Hon. J. Joseph Smith, Circuit Judges.

ORDER GRANTING PETITION FOR REHEARING IN BANC—
March 28, 1961

A petition for rehearing in banc having been filed herein by counsel for the appellees and motions having been made by counsel for the International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, UAW, AFL-CIO and New York State AFL-CIO for leave to file briefs amicus curiae,

Upon consideration thereof, it is

Ordered that the petition for rehearing in banc be and it hereby is granted.

Further ordered that the motions of the International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, UAW, AFL-CIO and the New York State AFL-CIO for leave to file briefs amicus curiae be and they hereby are granted and that each may file a brief amicus curiae not to exceed 25 pages on or before April 12, 1961.

Further ordered that the appellant may file an answering brief within fifteen days of the filing of the briefs amici curiae.

A. Daniel Fusaro, Clerk.

[fol. 74]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 99—October Term, 1960.

(Submitted April 25, 1961)

Docket No. 26343

DRAKE BAKERIES INCORPORATED, Plaintiff-Appellant,

—v.—

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL, AFL-CIO, Defendant-Appellee.

Before: Lumbard, Chief Judge, Clark, Waterman, Moore, Friendly and Smith, Circuit Judges.

Weil, Gotshal & Manges, New York, N. Y. (Robert Abelow, Milton Haselkorn and Marshall C. Berger, on the brief) for plaintiff-appellant.

[fol. 75] O'Dwyer & Bernstien, New York, N. Y. (Howard N. Meyer, on the brief) for defendant-appellee.

Rubenstein & Rubenstein, New York, N. Y. (Jerome S. Rubenstein, on the brief) for International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW, AFL-CIO, amicus curiae.

Edward Maguire and Herman A. Gray, New York, N. Y., for New York State AFL-CIO, amicus curiae.

PER CURIAM OPINION IN REHEARING—September 12, 1961

PER CURIAM:

This case was submitted to and considered by the active judges of this court after a majority of them had voted to

grant the appellee's motion for rehearing in banc. Judges Clark, Waterman and Smith vote to affirm the order of the District Court for the Southern District of New York, reported at —— Fed. Supp. ——. They point to the three recent decisions of the Supreme Court in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564 (1960); and *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960). Judges Lumbard, Moore and Friendly, not considering these decisions to be controlling, agree with the views of a panel of this court as expressed in an opinion written by Judge Swan and reported at 287 F. 2d 155 (1961) which reversed the order of the District Court. [fol. 76] Four judges are of the view that under such circumstances the order of the District Court is affirmed. Judges Lumbard and Friendly dissent and are of the opinion that under such circumstances the opinion of a panel of this court, reported at 287 F. 2d 155, remains in effect and should not be withdrawn.

Accordingly the opinion reported at 287 F. 2d 155 is withdrawn and the order of the District Court is affirmed.

[fol. 77]

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Charles E. Clark, Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Hon. Henry J. Friendly, Hon. J. Joseph Smith, Circuit Judges.

ORDER WITHDRAWING OPINION, VACATING JUDGMENT AND DIRECTING ENTRY OF NEW JUDGMENT—Sept. 12, 1961

A petition for rehearing in banc having been granted, supplemental briefs having been filed and the court having taken the action under further advisement,

Upon consideration thereof, it is

Ordered that the opinion of the court, dated February 17, 1961, be and it hereby is withdrawn.

Further ordered that the judgment of this court, dated February 17, 1961, be and it hereby is vacated and that a judgment be entered on the opinion of this court rendered September 12, 1961.

A. Daniel Fusaro, Clerk.

[fol. 78]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Charles E. Clark, Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Hon. Henry J. Friendly, Hon. J. Joseph Smith, Circuit Judges.

DRAKE BAKERIES, INCORPORATED, Plaintiff-Appellant,

—v.—

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL AFL-CIO, and LOUIS GENUTH, Secretary-Treasurer, Local 50, American Bakery and Confectionery Workers International, AFL-CIO, Defendants-Appellees.

JUDGMENT—Sept. 12, 1961

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the appellees.

A. Daniel Fusaro, Clerk.

[fol. 79] Clerk's Certificate to Foregoing Transcript (omitted in printing).

[fol. 80]

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 22, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is transferred to the summary calendar and set for argument immediately following Nos. 430 and 434.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.